"fundamental right," whether strict scrutiny or rational-basis scrutiny should apply, whether the state met its burdens to demonstrate "narrow tailoring" and a "compelling state interest," or any other issue raised in the combined 90 pages of the "Appellant's Brief" and "Appellant's Reply Brief," the panel decision reduced the issues in this case to the following "Straw Man" argument:

> Plaintiff makes a kind of 'fairness' or 'reciprocity' argument. *** His 'fairness' argument seems to be that he should receive this constitutional right [i.e., the right to decide not to become a parent after conception] in exchange for the woman's right to abort her pregnancy.

(App. B4-B5). The sole sentence in the Sixth Circuit's decision which references Due Process and levels of scrutiny reads as follows:

> Courts have never found that legal classifications based on this biological relationship of fathers and their children were subject to a high level of scrutiny. *See Parham v. Hughes*, 441 U.S. 347, 355-57 (1979) (upholding wrongful death statute granting cause of action only to unwed mothers, not unwed fathers, and imposing low level of scrutiny); *Rivera v. Minnich*, 483 U.S.

> 574, 580 (1987) ("putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law"); *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1270-83 (1980).

(App. B6).

The Sixth Circuit concluded its analysis by upholding the District Court's award of sanctions against petitioner: "We cannot imagine that any federal court would agree with plaintiff's principle...." (App. B8-B9).

Petitioner filed a "Petition for Panel Rehearing and Suggestion for Rehearing *En Banc*" which the Sixth Circuit denied on March 14, 2005. (App. A1-A2).

V.

REASONS FOR GRANTING THE PETITION

> If women have the right to choose if they become parents, men [should] have that right too. There is a connection between legalizing abortion for women and ending of paternity suits for men.

> Giving men their own choices would not deny choices to women. It would only eliminate their expectation of having those choices financed by men.
>
> -- Former N.O.W. President Karen DeCrow, Sexist Justice (Random House 1974).

The Sixth Circuit has decided an important issue of federal Constitutional law that has not been - but *should* be - settled by this Court: where one parent enjoys a fundamental right to avoid biological or legal parenthood – a fundamental right of parental, family, marital, reproductive, procreative, and personal privacy to choose when and with whom to become a parent – that right must be fundamental to ***each*** parent. Yet by ruling that a state may interfere in the status quo of ***private*** family decisions and force someone to become a parent in the eyes of the law, the Sixth Circuit thumbs its nose at this fundamental right to "procreational privacy."

By refusing to discuss (or even acknowledge) petitioner's position that a male has a post-conception fundamental right to decide whether to become a parent, the Sixth Circuit's decision commits two disservices. First, the Sixth Circuit's decision implies that no such right exists

when, in truth, this fundamental right is an inescapable outgrowth of numerous Supreme Court cases including *Planned Parenthood v. Casey*, *Planned Parenthood v. Danforth*, and several others.

Second, the Sixth Circuit rewrites the standard for imposition of sanctions on an unsuccessful plaintiff; the Sixth Circuit's opinion replaces this court's *Hughes v. Rowe*, 449 U.S. 5 (1980) standard with a new "We cannot imagine..." standard. In essence, the Sixth Circuit's opinion sends a foreboding message that not only will constitutional claims about procreational privacy for men not be acknowledged, anyone who dares tread on such sacred ground will be punished harshly with sanctions. If this is the intended message – if an entire gender's post-conception procreational privacy rights are to be discarded and invalidated – this is a step that should be taken by the Supreme Court.

A. Petitioner has a "Fundamental Right" to Decide for Himself When, Where, and With Whom He Will Beget a Child and Become A Father

Petitioner's position in this case can be summarized with the following set of premises and the resulting conclusion:

P_1: Parents enjoy a fundamental right to procreational privacy which includes the right to decide not to become a parent even after conception.

P_2: Though this fundamental right has only found voice as applied to female biological parents, it must extend to each biological parent.

P_3: Kentucky's statutory scheme imposes parenthood on biological fathers while denying them any right or opportunity to avoid parenthood after conception.

Therefore: Kentucky's statutory scheme violates this biological father's fundamental right to procreational privacy.

1. The Right to Procreational Privacy

The right to privacy/autonomy includes the right to make one's own decisions about procreation and parenthood free from government interference. Our Constitution jealously protects "the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Time and time again, the Supreme Court has acknowledged:

> the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, 405 U.S. 438, 453 (1971). This "right of personal privacy" – first recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965) – includes the recognition that an individual's "freedom of personal choice in matters of marriage and family life" occupies a central place among the liberties protected by the due process clause. *Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416, 426 (1983). While the Court has never defined the specific parameters of the "right of privacy," that liberty

> includes 'the interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and childrearing and education.'

Carey v. Population Services International, 431 U.S. 678, 684-85 (1977) (citations omitted).

The Sixth Circuit's decision, though, implies that this fundamental right to procreational privacy stops at the male parent's decision whether or not to have sex. However, this Court has never held that a parent's liberty interest in parenthood stops at the decision whether to have sex; indeed, ever since *Roe v. Wade*, the federal courts have spent years demonstrating that sex is not sufficient to act as a waiver of a **mother's** constitutional rights; petitioner seeks judicial recognition that fathers are equally deserving of constitutional protection. Justice O'Connor's majority opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) proves instructive:

> These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. ***The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.***

Id. at 853 (emphasis added). The *Casey* Court recognized that the decision whether to have sex is not the end-all of

this fundamental rights analysis. If a woman's right to decide whether to be a mother survives failed efforts to avoid conception, then it is inescapable that a father's right to decide whether to be a father must also survive failed efforts to avoid conception.

2. Extending the Right to Men

The Sixth Circuit's opinion next declares that the biological relationship between biological fathers and their children has never enjoyed special protection. Once again, the Sixth Circuit ignores several of this Court's opinions.

In *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976), the Supreme Court took the next step by recognizing a father's "deep and proper concern and interest" in his wife's pregnancy and in the fetus she carries. Justice Stewart elaborated further, stating "that a man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom" and that his Due Process rights compete with the mother's rights rather than being subsumed by them. *Id.* at 90 (Stewart, J., concurring). And in dissent, three more Justices stated that a father's interest in the decision whether to carry his child to term "may be unmatched by any other interest in his life." *Id.* at 93 (White, J., dissenting).

The majority opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), goes even further by *equating* the mother's and father's respective fundamental rights:

> If this case concerned a State's ability to require the mother to notify the father before taking some action with respect to a living child raised by both, it would be reasonable to conclude, generally, that the father's interest in the welfare of the child and the mother's interest are equal.
>
> Before birth, however, the issue takes on a different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's liberty is doubly deserving of scrutiny such a case, ***as the State has touched not only upon the private sphere of the family, but upon the very bodily integrity of the pregnant woman***. The Court has held that, when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two,

> the balance weighs in her favor. * * * If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamental as the decision whether to bear or beget a child. ***The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.***

Id. at 895-96 (emphasis added).[1] In short, the mother's choice

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[1] In addition to these, the Supreme Court has decided at least six other cases which either explicitly or implicitly recognize a biological father's constitutional rights in decisions regarding the nature and extent of his parenthood. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (man's decisions on "procreation, childbirth, child-rearing, and family relationships" are "part of the fundamental 'right of privacy.'"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (Due Process clause entitled father to fitness hearing before his illegitimate children could be removed from his custody; "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (recognizing biological father's substantive due process rights but holding those rights not impermissibly burdened); *Caban v. Mohammed*, 441 U.S. 380 (1979) (invalidated statute under which biological father's children could be adopted without his consent); *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (recognizing constitutionally-

prevails because the abortion decision implicates a *second* fundamental right for her, i.e., the right to bodily integrity.

But the male's fundamental right to "basic control over [his] life" does not just vanish; that a pregnant woman's wishes trump the father's wishes at that stage of parenthood is an accident of biology – *not* a demeaning of the father's fundamental rights. Just as a woman has the right to decide not to be a mother even after conception, the sperm-donor's decision whether to be a father after conception is fundamentally his. Though he cannot manifest that right by compelling an abortion, the case at bar was to explore his alternatives.

3. How Kentucky's Statutory Scheme Violates the Fundamental Right

When a putative father is dragged into a paternity suit, what is at stake

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protected parental rights for fathers who participate in raising their illegitimate children); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (majority believed that under proper circumstances, biological father has substantive due process right to dictate whether his child will be adopted by someone else (four justices in dissent; Stevens, J., agreeing but concurring in result)).

> is not merely the prospect of a discrete payment in satisfaction of a limited legal obligation. Rather, it is the imposition of a lifelong relationship with significant financial, legal, and moral dimensions.

Rivera v. Minnich, 483 U.S. 574, 583 (1987)(Brennan, J., dissenting).

Kentucky's paternity, child support, and adoption/termination of parental rights statutes violate petitioner's fundamental right not to be a father in four ways. First, Kentucky's laws create a mechanism for the biological mother to enforce her right to decide whether or not to become a mother (abortion and adoption) but fail to afford a similar mechanism for enforcement of the biological father's right. (App. F1).

Second, Kentucky's termination of rights statutes create a process which in practice gives the biological mother the right to terminate her own rights ***and*** the biological father's rights at any time but fails to afford the biological father the right to terminate his own rights under any circumstances without the mother's consent.

Third, Kentucky's adoption statutes and "*de facto* custodian" statutes give the biological mother and a child's

step-father the exclusive right to decide whether petitioner's parenthood will continue without affording petitioner any mechanism by which to compel or even participate in that decision. (App. F1, G1).

Fourth, by forcing him to undergo paternity testing against his will, Kentucky's paternity statutes force a formal recognition of parenthood on unwilling men. Petitioner did not want to become a father, and petitioner was not a father in the eyes of society or in the eyes of the law for the first seven years of minor E.D.L.'s life; under the status quo, petitioner was not a father. It was not until Kentucky forced petitioner to participate in paternity proceedings that petitioner became a father in the eyes of society and in the eyes of the law. **It is that interference in the status quo by the state that violated petitioner's procreational privacy.**

4. The Import of the Sixth Circuit's Decision

The Sixth Circuit's decision in this case is in direct conflict with this Court's "procreational privacy" cases including *Roe v. Wade*, *Casey v. Planned Parenthood*, and their progeny. This court should accept review in order to clarify the reach of its "procreational privacy" cases and to resolve this important issue of constitutional law.

B. The Sixth Circuit's Decision on Sanctions Directly Contradicts Controlling Supreme Court Precedent

The relevant portion of the Sixth Circuit's opinion reads:

> In the present case, the facts are not in dispute. The plaintiff presents simply a novel legal theory.... * * * It is a theory so foreign to our legal tradition that it has no "foundation," no chance of success. We cannot imagine that any federal court would agree with plaintiff's principle that the concept of "procreative privacy" should be stretched [in the manner suggested]....

(App. B8-B9).

Initially, note that the panel's newly-announced standard directly contradicts the standard used by this Court. In *Hughes v. Rowe*, 449 U.S. 5 (1980), this Court held that fees may be assessed against a §1983 plaintiff only under the following "stringent" standard:

> [t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation.

> The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees.... [A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. . .

Id. at 14-15 (citations omitted). It is unclear how to reconcile the Sixth Circuit's new "We cannot imagine..." standard with "The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees...." *Id.* at 15.[2]

Likewise, a "plaintiff should not be assessed his opponent's attorney fees unless the court finds the claim was groundless at the outset or 'that the plaintiff continued to litigate after it clearly became so.'" *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 183 (6th Cir. 1985).

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[2] This court's admonition rings particularly true here: "it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978).

Nothing in the Sixth Circuit's decision (nor the District Court's opinion, for that matter) calls into question petitioner's decision to file suit, and no one has suggested that the state of the law in this area changed significantly during the pendency of this action.[3] Without these findings, upholding the District Court directly contradicts Sixth Circuit precedent:

> Neither the District Court nor the Magistrate Judge made a finding that the claims were "groundless at the outset" nor a finding that Riddle and Irvine continued to litigate after it "clearly" became so. * * * There is no finding by the lower court that the filing of the Complaint was an egregious case of misconduct by Plaintiffs. The District Court's finding that Riddle and Irvine's Complaint was frivolous and groundless and that Defendants be awarded fees under 42 U.S.C. § 1988 is not supported by the record.

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[3] The District Court did not dispute that petitioner's views about the social injustice of "forced fatherhood" are "firmly held"; similarly, the District Court seemed not to disagree that this lawsuit represents petitioner's "bona fide attempts to expand the realm of constitutional law to embrace his theory...." (App. C4). Indeed, each and every one of the District Court's "findings" addressed petitioner's failure to develop an argument – ***not*** whether it was reasonable for him to file suit in the first place.

Riddle v. Egensperger, 266 F.3d 542, 547 (6th Cir. 2001). *See also Tahfs v. Proctor*, 316 F.3d 584, 590 (6th Cir. 2003) (District Court abused discretion in awarding fees against unsuccessful plaintiff); *Dubuc v. Green Oak Twnshp.*, 312 F.3d 736 (6th Cir. 2002) (same result in §1983 action where it appeared District Court attempted to "teach Appellant a lesson....").

Perhaps the Sixth Circuit meant that petitioner's views are so repugnant that they will be met with disgust and vitriol by every judge who hears them. Though unnecessary to rehash the dangers of punishing litigants for bringing unpopular views to court, note the view of the Washington Court of Appeals when confronted with similar (Equal Protection) issues:

> The mother and guardian urge that this court determine their attorneys' fees to be assessed against the father because the issues presented by the father on appeal are frivolous. We conclude that the appeal is not frivolous. [I]ndeed, **the issues in this case are issues of first impression in this State and present debatable questions of substantial public importance.**

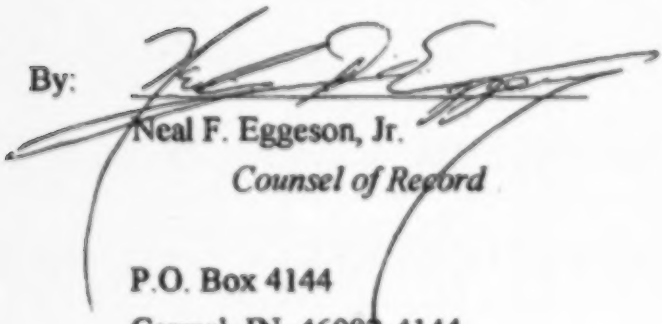
Linda D. v. Fritz C., 687 P.2d 223, 229-30 (Wash. App.

1984) (emphasis added). Not only does the Sixth Circuit's opinion concede that this is the first time these issues have reached a federal court, but no one can dispute that the issues of child support and procreational autonomy for men are of "substantial public importance."

VI.
CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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FILED
MAR 14 2005
LEONARD GREEN, Clerk

Nos. 03-6680/04-5156
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

N.E., as biological father of E.D.L., a minor,
Plaintiff-Appellant,
vs.
CINDY J. HEDGES, et al,
Defendants-Appellees.

ORDER

BEFORE: MERRITT, GIBBONS, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green, Clerk

FILED
DEC 20 2004
LEONARD GREEN, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION

Case Nos: 03-6680; 04-5156

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

N.E., as biological father of E.D.L., a minor,
Plaintiff-Appellant,
v.
CINDY J. HEDGES, BRIAN HEDGES, and JAMES C. MONK,in his official capacity as county attorney for Carroll County,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Kentucky at Frankfort. No. 03-00020—Joseph M. Hood, District Judge.
Submitted: December 10, 2004
Decided and Filed: December 20, 2004
Before: MERRITT, GIBBONS, and ROGERS, Circuit Judges.

OPINION

MERRITT, Circuit Judge. Plaintiff-appellant, a lawyer, brings his own *pro se* action and appeal against the mother of his child born out of wedlock and her husband, the stepfather of the child. He also sues James Monk, the county attorney of Carroll County, Kentucky, in his official capacity. The theory of the action is that the Kentucky statutes requiring a natural father to pay child support for his son born out of wedlock, as enforced in the state courts in this case by Monk,[1] violate the substantive due process protections of the Fourteenth Amendment. The Kentucky courts have ordered plaintiff to pay $851 per month in child support. The District Court dismissed plaintiff's complaint for "failure to state a claim upon which relief can be granted" under Rule 12(b)(6) of the Federal Rules of Civil Procedure and awarded costs and attorneys fees to defendants under 42 U.S.C. § 1988. The essential holding of District Judge Hood was stated as follows:

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[1] Ky. Rev. Stat. § 406.021 provides the county attorney with the authority to file paternity actions in the district courts of Kentucky seeking to enforce child support obligations established by the Kentucky Cabinet for Families and Children under § 405.430(4) of Kentucky law. These state paternity and child support actions are encouraged and supported by the original Child Support Enforcement Act, 42 U.S.C. §§ 651-669, an act interpreted and explained in *Blessing v. Freestone*, 520 U.S. 329, 333-34(1997) ("But the state [under the federal law] must do more than simply collect overdue support payments; it must also establish a comprehensive system to establish paternity, locate absent parents, and help families obtain support orders.")

> Plaintiff has identified no action taken by a state actor that impacted in any way his choice to father a child. As he complains of actions taken under the Commonwealth's statutes that permit the establishment of paternity and the imposition and enforcement of child support obligations, the Court sees no evidence that the state required him to engage in the sexual activity that resulted in the conception of his son. Further he has identified no action taken by a state actor that interfered in any way with his choice to use or not to use contraceptive methods—or additional contraceptive methods, as the case may be—during sexual activity to avoid his sexual partner's resulting pregnancy. Accordingly, he cannot state a claim for a violation of his substantive rights under the Fourteenth Amendment by the application of the laws of Kentucky for establishing paternity and imposing and enforcing child support obligations.

JA 81-82.

Although plaintiff sought money damages of $1 million and injunctive relief requiring the stepfather to adopt the child and various other forms of relief in his original complaint, he limits his appeal to a claim for injunctive relief based on a declaration that Kentucky

paternity and child support laws are invalid. He also seeks an order enjoining Monk from enforcing child support orders entered in his case in Kentucky courts. The parties have filed extensive briefs but waived oral argument.

Plaintiff makes a kind of "fairness" or "reciprocity" argument. His basic claim is that the mother of the child "fraudulently induced" sexual intercourse, claiming that her birth control pills would prevent pregnancy, then left the state, married another man, and delayed seeking child support for several years after birth. The plaintiff argues that the Kentucky paternity and child support laws are inconsistent with sexual and procreative "privacy" rights recognized by the Supreme Court, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The right to procreative privacy, he argues, "includes the right to decide not to become a parent even after conception," and "must extend to both biological parents," so that "Kentucky's statutory scheme" must be invalidated because it "imposes parenthood on biological fathers while denying them any right or opportunity to decide not to become a parent after conception." (Appellant's Reply Brief, p. 3.).[2] His "fairness" argument seems to be that he

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[2] Plaintiff's argument is succinctly stated at p. 6 of his reply brief as follows:

should receive this constitutional right in exchange for the woman's right to abort her pregnancy.

State requirements, and federal encouragement, of child support from unwed fathers has a long historical tradition. It emanates necessarily from the biological relationship, a relationship that may have only marginal

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> [I]t is disingenuous to pretend that imposing a child support obligation is separate and distinct from forcing fatherhood on an unwilling male. Even if Kentucky eliminated all child support obligations tomorrow, its paternity laws would remain unconstitutional. It is the fact that Kentucky forced N.E. [plaintiff] to participate in paternity proceedings which proved his fatherhood that renders the statutory scheme unconstitutional. No one disputes that providing for the financial well-being of out-of-wedlock children is important, but Kentucky does not arrest random individuals off the streets and require each of them to financially support wards of the state; rather, Kentucky reserves that burden for those men it has forced to become fathers. The ONLY reason N.E. is forced to financially support minor E.D.L. is because of the finding of paternity. It was unconstitutional for Kentucky to force parenthood on N.E. Because the support obligation necessarily follows from the forced fatherhood, it is therefore unconstitutional for Kentucky to impose a child support order on N.E.; the issues are inextricably intertwined.

This argument appears to be based on arguments for new state legislation in a law review article, Melanie McCulley, *The Male Abortion: The Putative Father's Right to Terminate His Interests in and Obligations to the Unborn Child*, 7 J.L. & POL'Y 1 (1998).

importance for the male in some cases like the one before us in which the father seeks to remove himself completely from the child. Courts have never found that legal classifications based on this biological relationship of fathers and their children were subject to a high level of scrutiny. *See Parham v. Hughes*, 441 U.S. 347, 355-57 (1979) (upholding wrongful death statute granting cause of action only to unwed mothers, not unwed fathers, and imposing low level of scrutiny); *Rivera v. Minnich*, 483 U.S. 574, 580 (1987) ("putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law"); *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1270-83 (1980). The paternity requirement emanates primarily from the state's power to intervene under the parens patriae doctrine, a doctrine that enforces the duties of biological parents, not their constitutional rights.[3] The parens patriae authority was granted by the English sovereign to the chancery courts to

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[3] The historical parens patriae power discussed here should not be confused with its generic modern relative, the parens patriae civil action, a type of action not necessarily related to either parents or children. Used in the modern sense, parens patriae is "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen . . . ." BLACK'S LAW DICTIONARY 1137(7th ed. 1999). For example, under section 4c of the Clayton Act, "[a]ny attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State . . . for injury sustained by such natural persons to their property by reason of any violation of section 1 to 7 of this title." 15 U.S.C. § 15c (2000).

act as "general guardians of all infants," 3 William Blackstone, Commentaries *47. Under this doctrine, the children's welfare rather than the parents' rights became the most important factor, *Developments in the Law — The Constitution and the Family*, *supra*, at 1221. American courts have generally recognized the doctrine and regarded as an important interest the fact that "the State is entitled to adjust its legal system to account for children's vulnerability . . . ." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

As the plaintiff concedes, there are no judicial decisions recognizing a constitutional right of a man to terminate his duties of support under state law for a child that he has fathered, no matter how removed he may be emotionally from the child. Child support has long been a tax fathers have had to pay in Western civilization. For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring — even if unwanted and unacknowledged — remains constitutionally sufficient to support paternity tests and child support requirements. We do not have a system of government like ancient Sparta where male children are taken over early in their lives by the state for military service. The biological parents remain responsible for their welfare. One of the ways the state enforces this duty is through paternity laws. This responsibility is not growing weaker in our body politic, as plaintiff seems to suggest, but stronger as the passage of the Child Support Recovery

Act of 1992, Pub. L. No. 102-521, the Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, and the Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, would indicate. The sexual privacy cases referred to by plaintiff do not give either biological parent the right to escape responsibility after the child is born. Neither the laws of biological reproduction nor the Due Process Clause recognize the "fairness" arguments plaintiff raises. Reproduction and child support requirements occur without regard to the male's wishes or his emotional attachment to his offspring.

With respect to the District Court's award of costs and attorneys fees in civil rights cases under 42 U.S.C. § 1988 (court may award attorney's fees to the "prevailing party" in "its discretion"), the appropriate standard provides that the court may award such fees to a defendant if "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Wayne v. Village of Sebring*, 36 F.3d 517, 530 (6th Cir. 1994). In the present case, the facts are not in dispute. The plaintiff presents simply a novel legal theory, a theory that would invalidate the paternity and child support laws of the fifty states and the federal acts on child support. The theory is that unwed fathers, as a matter of reciprocity, should also be given the choice to deny any financial responsibility for the child's existence. It is a theory so foreign to our legal tradition that it has no "foundation," no chance of success. We cannot imagine that any federal

court would agree with plaintiff's principle that the concept of "procreative privacy" should be stretched to include the constitutional right for a father to receive the constitutional equivalent of the termination of the mother's pregnancy by allowing him the right to deny paternity and deny the duty of financial support. The District Court therefore did not abuse its authority to award fees under § 1988.

Accordingly, the judgment of the District Court is AFFIRMED.

Eastern District of Kentucky
FILED
JAN 16 2004
AT FRANKFORT
LESLIE G. WHITMER
CLERK U.S. DISTRICT COURT

United States District Court
Eastern District of Kentucky
Frankfort

CIVIL ACTION No. 03-20-JMH

N.E., as biological father of E.D.L., a minor,

Plaintiff,

vs.

CINDY J. HEDGES, et al,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants' motions for an award of attorney's fees [Record Nos. 40 and 41].

Plaintiff has responded [Record No. 42]. The Court being adequately advised, these motions are now ripe for decision.

Defendants request that the Court enter an order directing Plaintiff to pay their reasonable attorneys' fees pursuant to Fed. R. Civ. P. 54(d)(2), 42 U.S.C. § 1988, and 28 U.S.C. § 1927. For the reasons stated below, the Court believes that the requested attorneys' fees are warranted under 42 U.S.C. § 1988.

1. ATTORNEYS' FEES FOR PREVAILING DEFENDANTS LIMITED TO THOSE 42 U.S.C. § 1983 ACTIONS WHICH ARE FRIVOLOUS, UNREASONABLE, OR WITHOUT FOUNDATION.

42 U.S.C. § 1988 provides for attorney's fees, in relevant part, as follows:

> In any action or proceeding to enforce a provision of sections...1983...of this title..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs....

While Defendants have, indeed, prevailed on the merits in this matter, it is not enough to simply "win." Rather,

prevailing defendants in a § 1983 action may recover attorney's fees from the plaintiff only if the Court finds that "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (articulating standard for attorney's fees available to the prevailing defendant in action brought under Title VII of the Civil Rights Act of 1964); *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980) (adopting same standard for prevailing defendants in matters brought under 42 U.S.C. § 1983).

This is to say that "[t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation." *Hughes*, 449 U.S. at 15. Thus, Plaintiff is correct when he argues that his action was not meritless simply because his theory might represent an unpopular view or have been based on facts that were "somewhat questionable or unfavorable at the outset of litigation." Houston v. Norton, 215 F. 3d. 1172, 1175 (10th Cir. 2000).

Nonetheless, the Court is of the opinion that Plaintiff's claims were, at best, frivolous and, at worst, without any foundation whatsoever. In either event, they are certainly of the nature contemplated by *Christianburg Garment Co.* and *Hughes*. His belief – no matter how firmly held – that Kentucky's child support laws represent a "systemic social injustice" cannot a wrong of constitutional proportions make, and his allegedly bona fide attempts to expand the

realm of constitutional law to embrace his theory cannot make the case any less frivolous. [Response at 3.] His firmly held belief could not make the Fifth Amendment's protections, directly applicable only to actions taken by the federal government, expand to encompass county or state government officials. The Court recalls that Plaintiff, notwithstanding his many pages of pleadings, did not and could not identify a state action which interfered with any substantive right or ability to become or avoid becoming a father. Similarly, his firmly held belief could not mask the fact that his claim of a violation of his Fourteenth Amendment right to equal protection of the law was without any basis whatsoever. Notwithstanding the fact that the Court was able to conduct a very basic analysis of the situation, a fact the Plaintiff no doubt believes to lend some credence to his claim, he was unable to muster up any argument to support his claim – not identifying a distinct and unequally treated class of which he purported to be a part, a fundamental right that was in any way impacted, or a theory by means of which the Court could at least muse upon the legislature's rational basis for the allegedly unconstitutional statutes. There is no doubt in the Court's mind that his claims were frivolous and, thus, warrant an award of attorneys' fees for the prevailing Defendants in this matter.

2. ATTORNEYS' FEES CLAIMED BY DEFENDANTS MUST BE REASONABLE

A reasonable attorney's fee under sec. 1988 is determined by the reasonable hourly market rate in the relevant community for similar work multiplied by the amount of hours reasonably expended. *Blum v. Stenson*, 465 U.S. 886, 893 (1984); *Hadix v. Johnson*, 65 F.3d 532, 535-36 (6th Cir. 1995). Plaintiff has not objected to the hourly fees proposed by counsel for Defendants, and the Court finds that the fees suggested are, indeed reasonable.

Plaintiff does, however, object to the 3.5 hours reported by Hon. Dawahare for her defense of Defendants Brian and Cindy Hedges as unreasonable, pointing out that the dispositive and procedural motions and the motion for attorney's fees submitted on their behalf were identical to those submitted by Defendant Monk. He theorizes that she has not generated one single word of original research or writing on their behalf, choosing instead to submit a carbon-copy of those pleadings produced by counsel for Defendant Monk. Even if this is the case, the Court is of the opinion that 3.5 hours is not an unreasonable amount of time to contemplate and decide to adopt the rationale articulated in the motions submitted by Defendant Monk's counsel, particularly considering the length of the memoranda submitted in support of those motions and the depth of analysis contained therein. Finding that the hourly fee and the amount of time expended by all counsel on those motions was not unreasonable under the circumstances, the Court shall grant their requests.

3. CONCLUSION

For the reasons stated above, Defendants' motions for attorneys' fees shall be granted.

Accordingly, **IT IS ORDERED:**

(1) that Defendants' motions for an award of attorney's fees [Record Nos. 40 and 41] be, and the same hereby are, **GRANTED**;

(2) that Plaintiff **PAY** the sum of **$6,150.00** to Defendant Monk; and

(3) that Plaintiff **PAY** the sum of **$1,253.99** to Defendants Cindy and Brian Hedges.

This the 16th day of January 2004.

Signed by: *Joseph M. Hood*, United States District Judge

Eastern District of Kentucky
FILED
DEC 05 2003
AT FRANKFORT
LESLIE G. WHITMER
CLERK U.S. DISTRICT COURT

United States District Court
Eastern District of Kentucky
Frankfort

CIVIL ACTION No. 03-20-JMH

N.E., as biological father of E.D.L., a minor,
Plaintiff,
vs.
CINDY J. HEDGES, et al,
Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the motions of Defendant James C. Monk and Defendant Brian and Cindy Hedges to dismiss or for summary judgment [Record Nos. 7 & 12]. Plaintiff has responded [Record no. 28], and Defendants

have replied [Record Nos. 34 & 36].[1] This matter is ripe for a decision.

I. BACKGROUND

Plaintiff is the biological father of a child, E.D.L. Defendant Cindy Hedges is the biological mother of E.D.L. The Court understands that Defendant Brian Hedges is E.D.L.'s stepfather, by virtue of his marriage to Cindy Hedges. Plaintiff describes him as the "*de facto* father, guardian, and custodian of E.D.L...since 1994." [Complaint at 6.] Defendant James C. Monk serves as county attorney for Carroll County,Kentucky, and on June 27, 2001, he initiated paternity proceedings against Plaintiff under applicable Commonwealth statutes for the purposes of establishing paternity of E.D.L. and obtaining a child support order against Plaintiff. Plaintiff's paternity of E.D.L. was established in that proceeding, Carroll County District Court Case No. 01-J-00060, and arrearages and garnishment were imposed by virtue of the same.

In his complaint, Plaintiff alleges that the automatic attachment of financial liability on a putative father upon a finding of paternity under Ky. Rev. Stat. 405.00 *et seq.*, and

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[1] Plaintiff has also filed a motion for leave to file a surreply [Record No. 35]. Noting that neither the applicable Federal Rules of Civil Procedure nor the Local Rules make provision for surreply and that Plaintiff had the opportunity to address the issues he seeks to discuss in a surreply, an opportunity that he chose to forego, the Court shall deny his motion.

406, *et seq.*, violates his right to equal protection pursuant to the Fourteenth Amendment of the United States Constitution and his due process rights under the Fifth and Fourteenth Amendments, all as applied in the instant matter.[2] He further alleges the violation of the same equal protection and due process rights through the application of Ky. Rev. Stat. 199.00 *et seq.*, leaving the decision of whether or not to formally adopt a child to the non-parent spouse of a custodial parent and affording no power or authority to compel adoption by the spouse of the custodial parent to the non-custodial parent. He seeks injunctive relief, damages, and other relief as follows: (1) an order declaring the automatic attachment of financial liability and/or mandatory imposition of a support order upon a finding of paternity under Ky. Rev. Stat. 405.00, *et seq.*, and 406.00, *et seq.*, to be unconstitutional as applied; (2) an

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[2] Plaintiff has also filed a motion for leave to amend his complaint and to join an additional defendant, the Kentucky Cabinet for Families and Children [Record No. 23]. The Kentucky Cabinet for Families and Children is an agency of the Commonwealth of Kentucky and is protected from his claims under 42 U.S.C. 1983 by the cloak of the Eleventh Amendment sovereign immunity discussed in this memorandum opinion and order. *See sec.* III.A., *infra*. Accordingly, such an amendment would be futile. *Thiokol Corp. v. Department of Treasury, State of Mich, Revenue Div.*, 987 F.2d 376, 382 (6th Cir. 1993). Noting that this Court need not permit the amendment of a complaint where it would not survive a motion to dismiss, the Court shall deny Plaintiff's motion. *Neighborhood Development Corp. v. Advisory Council on Historic Preservation*, 632 F.2d 21, 23 (6th Cir. 1980).

order enjoining the county prosecutor for Carroll County, Kentucky from enforcing any and all support and arrearage orders issued by the Carroll County District Court; (3) an order compelling the adoption of his son by Defendant Brian Hedges, (4) an order of damages in the amount of $1,000,000.00 against Defendants, and (5) an award of attorney's fees and costs. In the motion to dismiss of for summary judgment, Defendant Monk argues that (1) Plaintiff's claims against the county attorney should be dismisses as barred by the Eleventh Amendment to the Constitution of the United States, (2) that this Court should abstain from accepting jurisdiction over the remaining claims for prospective injunctive relief under the *Younger* abstention doctrine, the *Rooker-Feldman* doctrine, the domestic relations doctrine, or by virtue of the doctrines of *res judicata* and collateral estoppel. Next, Defendant Monk argues that (3) the complaint fails to state a claim upon which relief can be granted and (4) that the complaint is barred in part by the applicable one year statute of limitations.

II. STANDARD OF REVIEW

With regard to Defendants' motions to dismiss this matter under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, this Court must accept all factual allegations in Plaintiffs' amended complaint as true. *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 996 (6th Cir. 1994). The complaint may be dismissed only if it is clear that no relief could be granted on any set of facts that could be proven consistent with the

allegations, and this Court's review amounts to a determination of whether it is possible for the plaintiff to prove any set of facts in support of its claims that would entitle it to relief. *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996); *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). Generally, this Court must ignore all outside evidence submitted by the parties in ruling on the pending motions to dismiss. However, a court may consider public records, those matters of which the Court may take judicial notice, and letter decisions of governmental agencies.[3] *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999), *overruled on other grounds Swierkiewicz v. Sorema*, 534 U.S. 506 (2002).

III. DISCUSSION

A. SUIT FOR DAMAGES AGAINST DEFENDANT MONK IS BARRED BY SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT AS DEFENDANT MONK WAS ACTING AS AN ARM OF THE STATE

Suits against an individual in his/her official capacity "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 690, n. 55 (1978). "An official capacity suit is, in all respects other

[3] Thus, the Court will consider the pleadings and orders entered in Carroll County District Court Case No. 01-J-00060, and all appeals taken therefrom, as they are matters of public record.

than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citing *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985)). Therefore, an official of the state is cloaked with the same immunity as the state under the Eleventh Amendment. Suits brought pursuant to sec. 1983 against state governments or state officers in their official capacity are barred. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). However, municipalities and other local government units are considered "persons" subject to suit under the provisions of sec. 1983. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978). Thus, if an official suit is barred by the Eleventh Amendment if the named official was acting as an arm of the state but the suit will be allowed if the named official was acting as an arm of the municipality.

In the present case, Defendant Monk has argued that he is an arm of the state because he was enforcing the official policy of the state through Kentucky statutes. Since Defendant Monk is employed by the county, the Plaintiff has argued that Defendant Monk is not immune from suit pursuant to *Monell*. Accordingly, the Court must first determine whether a county attorney enforcing state statutes may ever fit within the *Monell* exception.

1. UNCONSTITUTIONAL ACTION MUST BE EXECTUED BY THE FINAL

POLICYMAKER AND MUST REPRESENT OFFICIAL MUNICIPAL POLICY

As noted above, municipalities and other local governments are subject to suit for damages brought pursuant to § 1983. However, there are limitations to the types of actions and officers that can subject a municipality to the perils of suit. "Congress did not intend municipalities to be held liable unless action pursuant to *official municipal policy* of some nature caused a constitutional tort." *Monell*, 436 U.S. at 691 (emphasis added). Therefore, municipalities may be directly sued for "monetary, declaratory or injunctive relief" in situations where the alleged unconstitutional action "implements or executes a policy statement, ordinance, regulation or decision officially adopted or promulgated by that body's officers." *Id.* at 690.

The named officer of the municipality must be the final policymaker for the alleged unconstitutional act or policy and that policy must actually be municipal policy. Thus, liability must be premised on a stronger basis than that of respondent superior. *Id.* at 692-93. "It is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under 1983." *Monell*, 436 U.S. at 694. In other words, the official must be the final policymaker for the municipality, or in this case, the county. In addition, the court must "ask whether governmental officials are final policymakers for the local

government in *a particular area*, or on *a particular issue*." *McMillan v. Monroe County*, 520 U.S. 781, 785 (1997) (emphasis added). Therefore, an individual, in this case, the county attorney, is not categorically the agent of the state or of the county. Instead, the official may be an agent of the state when acting in one role and the agent of the county when performing another function. Each decision by each policymaker must be analyzed separately. The court's determination "of the actual function of a government official, in a particular area, will necessarily be dependent on the definition of the official's function under relevant state law." *Id.* at 786.

In addition to showing that the agent is the final policymaker, the *Monell* test, as clarified by the Sixth Circuit, requires that "the plaintiff must '[1] identify the policy, [2] connect the policy to the city itself and [3] show that the particular injury was incurred because of the execution of that policy'" in order to proceed in a suit against an official. *Garner v. Memphis Police Dept.*, 8 F.3d 358, 363-64 (6th Cir. 1993) (quoting Coogan v. City of Wixom, 820 F.2d 170, 176 (6th Cir. 1987). Both parties concede that the county attorney is the final policymaker in the enforcement of Kentucky's allegedly unconstitutional child support laws. However, Plaintiff insists that the question of liability ceases upon this determination. The Plaintiff glosses over the second prong of the test as stated *Garner*, to "connect the policy to the city [or the county] itself." *Garner*, 8 F.3d at 364. This component may not be

satisfied, as Plaintiff argues, by showing that the county attorney is the final policymaker. (Pl.'s Opposing Mem. At 8-11). Plaintiff must also demonstrate that the policy is the official policy of the municipality. This analysis focuses upon whether the policy implemented is that of the state of Kentucky or of the municipality. As noted above, if the county attorney is implementing state policy rather than local or municipal policy, then he is an arm of the state in regard to those duties. *McMillan*, 520 U.S. at 785, n. 2.

2. DEFENDANT MONK IS THE FINAL POLICYMAKER FOR THE STATE, NOT THE COUNTY, BECAUSE HE IS ENFORCING STATE STATUTES

Relevant case law supports the Defendant's assertion that the county attorney, under the facts of this case, is an arm of the state and, therefore, is immune from suit. In *Pusey v. Youngstown*, the Sixth Circuit Court of Appeals held that a county attorney was acting as a state agent when enforcing Ohio criminal statutes. *Pusey v. Youngstown*, 11 F.3d 652 (6th Cir. 1993); see also, *Scott v. O'Grady*, 975 F. 2d 366 (7th Cir. 1992); *Echols v. Parker*, 909 F.2d 795 (5th Cir. 1990). In *Pusey*, the mother of a homicide victim sued the county attorney in his individual and official capacity under § 1983 for failure to comply with Ohio's victim impact laws. *Pusey*, 11 F.3d at 654. Concluding that state criminal laws and state victim impact laws are clearly the policy of the state, the court concluded that the county attorney, although employed by the city of Youngstown,

was acting "on behalf of the state when...prosecuting state criminal charges" and reducing those charges. *Pusey*, 11 F.3d at 657. Since the county attorney was acting as a state agent, the suit was treated as a suit against the state, and it was barred by sovereign immunity. *Id.*

Plaintiff, who does not try to distinguish this matter from *Pusey*, directs the Court's attention to *Pembaur v. Cincinnati*. *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). In this case the Supreme Court found that the county attorney was not protected from suit under § 1983. *Pembaur*, 475 U.S. at 479. However, *Pembaur* is distinguishable from the present case and from *Pusey* by separating the type of policy at issue in each case. In *Pembaur*, several deputy sheriffs, although armed with valid capiases to procure witnesses needed for trial, were unable to gain entry to a physician's clinic. *Pembaur*, 475 U.S. at 472. Unsure of how to proceed, the deputy sheriffs contacted their superior officer, who told tem to call the assistant prosecutor. *Id.* After conferring with the county prosecutor, the assistant prosecutor instructed the deputy sheriffs to "go in and get" the witnesses. *Id.* The county attorney was not acting under state policy when he directed the police officers. *Pembaur*, 475 U.S. at 473. The county attorney was the final policymaker for the municipality according to state law. *Pembaur*, 475 U.S. at 484-85. The Supreme Court noted that the county prosecutor was not rendering "legal advice," but, rather, exercising his authority, granted through state statute, to establish county

policy in these matters. Id. ("Ohio Rev. Code Ann. § 309.09 (A) (1979) provides that county officers may 'require...instructions from [the County Prosecutor] in matters connected with their official duties.'") Therefore, the Court finds that *Pembaur* is distinguishable from *Pusey*, as well as the case at bar, because the county attorney was not enforcing statutes promulgated by the state legislature, as in *Pusey*, but setting forth municipal policy expressly delegated by the legislature.

The Sixth Circuit Court of Appeals clarified the above distinction in *Brotherton v. Cleveland*, 173 F.3d 552 (6th Cir. 1999). The *Brotherton* court stated that "[t]he essential question asks whether [the defendant] could have chosen not to use his authority under the state statute and how he would use such authority; if he could have opted to act differently, or not to act, he did not act as an arm of [the state] when he formulated and implemented the contested policy." *Id.* at 556. The court also noted that "[t]his distinction reconciles *Garner* and *Pusey*." *Id.* at 556. This line of reasoning further illustrates the distinction between *Pusey* and *Pembaur*. The county attorney had the ability to use his discretion in choosing if and how to act with regard to the enforcement of the capiases in *Pembaur*. However, the county attorney does not have the same degree of decision-making power when enforcing a state statute as in *Pusey* and the present case. As a result, the current circumstances do not fall within the Monell exception to the general rule that a suit for damages may not proceed

against an individual in his or her official capacity. Thus, the current case is controlled by the Sixth Circuit's ruling in *Pusey*.

In both the case at bar and *Pusey*, a county attorney was enforcing state statutes. Although a county attorney is an employee of the county, the Court agrees with Defendant that a county attorney is acting as an arm of the state when enforcing state policy represented by statutes. Thus, Defendant Monk was acting as an arm of the state, just as the county attorney in *Pusey* was an arm of the state, while enforcing state statutes and the suit for damages may not proceed against him.

B. SUIT FOR PROSPECTIVE INJUNCTIVE RELIEF MAY PROCEED AGAINST DEFENDANT MONK IN ACCORDANCE WITH EX PARTE YOUNG

The law has long been settled that the Eleventh Amendment allows suit for prospective injunctive relief against a state official in his/her official capacity for ongoing constitutional violations. *Ex parte Young*, 209 U.S. 123 (1908). By performing an unconstitutional act the state official is stripped of his/her official or representative character. *Id.* at 159-60. Both parties recognize the validity of *Ex parte Young* doctrine. Defendant, however, alleges that the case at bar falls within the special sovereignty interest exception to this doctrine. *See Idaho v. Coeur d' Alene Tribe of Idaho*, 521 U.S. 261 (1997).

Defendant contends that the Commonwealth of Kentucky has a special sovereignty interest in "seeing that absentee parents pay child support rather than make the state taxpayers pick up that burden." [Reply at 9.] Undoubtedly, the Commonwealth interests are served by enforcing child support provisions. The *Coeur d' Alene* exception, however, is far too narrow to encompass the present case.

1. NARROW COEUR D'ALENE EXCEPTION DOES NOT ENCOMPASS ENFORCEMENT OF CHILD SUPPORT LAWS AS A SPECIAL SOVEREIGNTY INTEREST

In the first case applying the special sovereignty interest exception, the Supreme Court found that a Native American tribe was barred from bringing suit against the state of Idaho seeking enjoyment over the submerged lands of Lake Coeur D'Alene and injunctive relief against Idaho officials from exercising their regulatory power over the same submerged lands. *Coeur d' Alene*, 521 U.S. 261. The Court, in a highly divided decision, found that the relief sought infringed upon the sovereign interest in the ownership of the submerged lands. *Id.* at 280. The state's interest in these submerged lands was "an essential attribute of sovereignty." *Id.* at 283 (quoting *Utah Div. of State Lands v. U.S.*, 482 U.S. 193, 195 (1987). Furthermore, this relief was the "functional equivalent to a quiet title action" in that it sought to divest all benefits and control of the lands from the State of Idaho. *Id.* at 282. Therefore, the

actual relief sought, which was, in essence, a quiet title action, was barred by the Eleventh Amendment. *Id.*

Courts have interpreted *Coeur d' Alene* very narrowly.. *Martin v. Taft*, 222 F. Supp.2d 940, 961 (S.D. Ohio 2002). In accordance with *Coeur d' Alene*, the 6th Circuit has required a two part analysis. *Id.*; *MacDonald v. Village of Northport*, Mich., 164 F.3d 964, 972 (6th Cir. 1999). The court must first determine if a core sovereign interest is implicated. *Martin*, 222 F. Supp.2d at 961. If so, the court must then examine "whether the relief sought is so intrusive on the state's sovereignty that it constitutes the functional equivalent of relief the Eleventh Amendment bars." *Id.* at 961; *MacDonald* 164 F.3d at 973.

An analysis of relevant case law reveals that the circumstances of the current case do not represent a core sovereign interest. Courts have recognized few limited categories of special interests for the states: (1) the sovereign's interest in land, (2) the power to tax, (3) the emergency power of the governor to take private property, and (4) the power, directly granted to the state by Congress, to allocate tobacco settlement funds. See *Martin v. Taft*, 22 F. Supp.2d 940, 962-63 (S.D. Ohio 2002) (citing *Coeur d' Alene* at 283; *ANR Pipeline Co.* at 1193; *Barton v. Summers*, 293 F.3d 944, 955 (6th Cir. 2002); *Duke Energy Trading and Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1053-54 (9th Cir. 2001); *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1193-94 (10th Cir. 1998)).

Thus, the state's special sovereignty interest in enforcing child support statutes has not heretofore been established. Although the State does have an interest in the enforcement of its judgments, there is no evidence that this interest is "an essential attribute of sovereignty." *Coeur d' Alene*, 521 U.S. at 281. Due to the very limited nature of these core interests, the Court is unwilling to extend this exception to the facts of this case. Thus the first factor of the *Coeur d' Alene* exception has not been met.

Even assuming that this is a core sovereign interest, the relief sought does not satisfy the second prong of the *Coeur d' Alene* test – whether the relief sought is the functional equivalent of the type that the Eleventh Amendment bars. Defendant contends that the Eleventh Amendment bars this suit because a suit attacking existing child support orders is actually retrospective in nature. However, there is no indication that the type of relief sought is anything other than prospecuve relief that is allowed under the *Young* doctrine. Therefore, this suit, insofar as it seeks prospective injunctive relief, may proceed against Defendant Monk.

C. ABSTENTION AND *RES JUDICATA* DOCTRINES

Defendants next argue that the plaintiff's remaining claims are barred by the application of doctrine of Younger abstention, *Rooker-Feldman* doctrine, and domestic

relations doctrine, and that this matter is *res judicata*. For the reasons which follow, the Court disagrees.

1. *YOUNGER* ABSTENTION

Principles of comity and federalism underlie the doctrine that a federal court should not interfere with an ongoing state criminal proceeding by granting injunctive or declaratory relief absent extraordinary circumstances. *Younger v. Harris*, 401 U.S. 37, 43-54 (1971); *Samuels v. Mackell*, 401 U.S. 66, 68-74 (1971). The same counsel applies to non-criminal proceedings when important state interests are involved. *Middlesex County Ethics Comm. V. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Thus, through the teaching of *Younger*, abstention would be required when: (1) state proceedings, judicial in nature, are pending; (2) the state proceedings involve important state interests; and (3) the state proceedings afford adequate opportunity to raise the constitutional issue. *Id.*

In the instant matter, the Court does not believe that *Younger* abstention is appropriate. Specifically, Defendants have not identified any relevant pending state proceedings. While Kentucky courts continue to exercise jurisdiction over plaintiff's support obligations, it does not appear that there is any matter pending before any court of Kentucky which would afford adequate opportunity to raise

the constitutional issue.[4] Further and notwithstanding the jurisdiction of the state courts over the continuing support obligations, the Carroll Circuit Court remarked in its opinion on the appeal of the Carroll District Court's decision that it appears that the counterclaim, in which Plaintiff attempted to raise a challenge identical to that contained in the present complaint, was outside of the limited jurisdiction of the Carroll District Court as stated in KY. REV. STAT. 24A.110-130. This Court agrees. Accordingly, the *Younger* doctrine may not be properly invoked.

2. *ROOKER-FELDMAN* DOCTRINE

Federal district courts may not review the determinations of a state court or interfere with a final state court judgment. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). The Sixth Circuit Court of Appeals has described the *Rooker-Feldman* doctrine as follows:

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[4] While defendants have argued that federal courts must abstain from interfering with enforcement of state court judgments, relying on *Pennzoil Co. v. Texaco, Inc.*, the Court believes that this matter is simply inapposite to that in *Pennzoil* where not only had a state court judgment been obtained, there was also a challenge to the validity of the disputed statute actually pending in the state courts. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14 (1987).

> [a] combination of abstention and *res judicata* doctrines, [which] stands for the proposition that federal district court may not hear an appeal of a case already litigated in state court. A party raising a federal question must appeal a state court decision through the state system and then directly to the Supreme Court of the United States.

United States v. Owns, 54 F.3d 271, 274 (6th Circ. 1995). Plaintiff urges this Court to adopt the reasoning of the Eighth Circuit Court of Appeals in *Ballinger v. Culotta*, a matter in which the plaintiff sought relief under 42 U.S.C. § 1983 from a child custody judgment of state court and in which the Court of Appeals determined that, under the *Rooker-Feldman* doctrine, abstention would be proper. *Ballinger v. Culotta* 322 F.3d 546 (8th Cir. 2003). The Court declines to do so, noting that there is no indication that the plaintiff in *Ballinger* could not have raised his federal question in the underlying state proceeding. Again, this Court notes that the federal question raised by Plaintiff has not been and could not have been litigated nor any final judgment entered on the issue of the constitutionality of the challenged statutes in the earlier state court proceedings. Accordingly, the doctrine of *Rooker-Feldman* does not apply to the circumstances at hand.

3. DOMESTIC RELATIONS DOCTRINE

As Defendants remind the Court, "[t]he whole subject of domestic relations of a husband and wife, parent and child,

belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890). No doubt, abstention from matters involving domestic relations is an accepted exception to federal court diversity jurisdiction, specifically "as it pertains to divorce and alimony decrees and child custody orders." See *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *McCarty v. McCarty*, 453 U.S. 210 (1981), *McLaughlin v. Cotner*, 193 F.3d 410, 412-13 (6th Cir. 1999). Nonetheless, Plaintiff has identified a federal question and seeks damages in tort under § 1983, suitable for decision before a federal district court. *See Ankenbrandt*, 504 U.S. at 703 & 706. Simply because Plaintiff's challenge touches on a maters of domestic concern, the establishment of paternity, child support obligations, and adoption, the Court will not be making any assessment of support, any decisions regarding Plaintiff's status as the father of his child, or acting upon an adoption in this matter. See *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Fernos-Lopez v. Lopez*, 929 F.2d 20, 22-23 (1st Cir. 1991); *Agg v. Flanagan*, 855 F.2d 336, 339 (6th Cir. 1988). Accordingly, this Court is not required to abstain and shall not do so in this matter.

4. ***RES JUDICATA***

"[28 U.S.C. §] 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments would be given in the courts of the State from which the judgments emerged." *Kremer v.*

Chemical Const. Corp. 456 U.S. 461, 466 (1982). The Kentucky law of *res judicata* or claim preclusion "may be used to preclude entire claims that were brought or should have been brought in a prior action, while the doctrine of collateral estoppel [or issue preclusion] only applies to issues actually litigated." *City of Covington v. Board of Trustees of Policemen's and Firefighters' Retirement Fund*, 903 S.W.2d 517, 521 (Ky. 1995). In the instant matter, as discussed above, it is quite clear that while Plaintiff attempted to bring his 42 U.S.C. § 1983 claims as a counterclaim to the underlying paternity case, the district court did not have jurisdiction to hear his claims. Accordingly, the merits of his constitutional attacks have not been litigated nor could they have been. The claims at hand are not *res judicata*.

C. FAILURE TO STATE A CLAIM

The Court now turns to a determination of whether or not Plaintiff can state his remaining claims if the Court accepts all factual allegations in Plaintiffs' amended complaint as true. In his complaint, pursuant to 42 U.S.C. sec. 1983, Plaintiff alleges that the automatic attachment of financial liability on a "putative" father upon a finding of paternity under Ky. Rev. Stat. 405.00, *et seq.*, and 406, *et seq.*, violates his right to equal protection pursuant to the Fourteenth Amendment of the United States Constitution and his due process rights under the Fifth and Fourteenth Amendments, all as applied in the instant matter. He

further alleges the violation of the same equal protection and due process rights through the application of Ky. Rev. Stat. 199.00, *et seq.*, leaving the decision of whether or not to formally adopt a child to the non-parent spouse of a custodial parent and affording no power or authority to compel adoption by the spouse of the custodial parent to the non-custodial parent.

"To state a claim under sec. 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Accordingly and without needing to reach the issue of whether Defendants Cindy J. Hedges or Brian Hedges were state actors for purposes of sec. 1983 jurisprudence, this Court must dismiss Plaintiff's sec. 1983 claims for the reasons stated below.

1. PLAINTIFF HAS FAILED TO STATE A CLAIM UNDER THE FIFTH AMENDMENT

Plaintiff's claims under the Fifth Amendment shall be dismissed as the due process protections afforded by the Fifth Amendment pertain only to actions taken by the federal government, not state or local governments as alleged in this matter. *See Barkus v. Illinois*, 359 U.S. 121, 124 (1959); *Newsom v. Vanderbilt University*, 653 F.2d 1100, 1113 (6th Cir. 1981).

2. PLAINTIFF CANNOT STATE A CLAIM FOR VIOLATION OF HIS SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT

The Fourteenth Amendment provides that state and local governments shall not deprive any person of "life, liberty, or property without due process of law." U.S. Const. Amend. XIV. There has been some debate between the parties as to whether or not Plaintiff complains of violations of his procedural due process rights or his substantive due process rights under the Fourteenth Amendment. In his response, however, Plaintiff has categorically stated that he does not allege any procedural deficiency with regard to the proceedings in the earlier state action. Rather, he states that his allegations concern a violation of substantive due process. Accordingly, the Court shall examine only that claim.

In a substantive due process analysis, the Court inquires into whether or not the government has a sufficient justification for taking away a person's life, liberty or property.[5] The Court must first ascertain which aspect of

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[5] Plaintiff could also state a claim by identifying a state act so outrageous that it shocks the conscience and is an official act which 'may not take place no matter what procedural protections accompany them.' *G.M. Engineers v. West Bloomfield*, 92 F.2d 328, 332 (6th Cir. 1990) (quoting *Hayes v. Vessey*, 777 F.2d 1149, 1152 (6th Cir. 1985)); *Pearson v. City of Grand Blanc*, 756 F.Supp. 314, 318-19 (E.D. Mich. 1991). The Court does not find anything in the complaint or the

Plaintiff's life, liberty, or property has been impacted by a state action in order to ascertain which level of scrutiny to apply to the state actor's reasons for acting. If a fundamental right has been impinged upon, strict scrutiny will apply. If not, generally a rational basis test is applied.

With regard to what aspect of his "life, liberty, or property" is at stake, Plaintiff first argues that the application of the laws of Kentucky for establishing paternity and imposing and enforcing child support obligations touches sufficiently on his fundamental rights with regard to procreation, i.e., the "decision whether to be a father," so as to violate his Fourteenth Amendment rights to due process. [Response at 30]. The same fundamental right, he asserts, empowers him to compel an adoption of his son by the child's stepfather.

Even though a fundamental right to procreate or not procreate has been identified in American jurisprudence, the Court is not convinced that Plaintiff can identify an infringement of that right by the state in the instant matter.[6]

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records of the state proceedings that suggests behavior so outrageous as to shock anyone's conscience in this way.

[6] Having ascertained that there exists a fundamental right regarding the choice to beget a child, a right which takes various forms, the Court is not convinced that there exists within that fundamental right a subset of liberty including the choice of whether or not to be charged with paternity or whether or not to provide support to one's child once that child is conceived, at least not as it is understood by Plaintiff.

See Planned Parenthood v. Casey, 505 U.S. 833 (1992) (unconstitutional to ban abortions prior to viability although state may regulate abortions before viability so long as it does not place an "undue burden" on access to abortions); *Carey v. Population Services International*, 431 U.S. 678 (1977) (state law criminalizing sale or distribution of contraceptives to minors, limiting distribution to pharmacists, and forbidding advertisement or display of contraceptives was unconstitutional); *Roe v. Wade*, 410 U.S. 113 (1973) (unconstitutional for state to prohibit abortions prior to viability); *Eisenstadt v. Baird*, 405 U.S.

The Court remarks that there are two understandings of the word "father." The first involves anyone who provides sperm to fertilize an egg. There is nothing "putative" about Plaintiff's status in this regard. As to the second type of "fatherhood," the type of involvement in the raising and nurturing of a child conceived in the first sense, the Court does not understand Plaintiff's complaint to speak to this type of fatherhood. Even if it had, the Court is not convinced that the challenged statutes interfere with any sort of privacy or associational right that might be asserted by Plaintiff so as to be unconstitutional. Clearly, a biological parent has a fundamental liberty interest in the custody of his or her child. *See Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982). Even if the Court assumed in the face of its sincere doubts that he could establish, as a corollary to an interest in custody, a fundamental right regarding the right to choose whether or not to be a father in the second, more social sense of the word, the Court is convinced that the laws could survive the strict scrutiny prescribed, for the state could present a compelling interest in the welfare of children through making sure that parents provide for their children's needs.

438 (1972) (state law prohibiting distribution of contraceptives to unmarried individuals held unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state statute prohibiting use and distribution of contraceptives held unconstitutional on basis of right to privacy); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (state statute allowing court-ordered sterilization of repeat criminal offenders was unconstitutional).

Plaintiff has identified no action taken by a state actor that impacted in any way his choice to father a child. As he complains of actions taken under the Commonwealth's statutes that permit the establishment of paternity and the imposition and enforcement of child support obligations, the Court sees no evidence that the state required him to engage in the sexual activity that resulted in the conception of his son. Further he has identified no action taken by a state actor that interfered in any way with his choice to use or not to use contraceptive methods – or additional contraceptive methods, as the case may be – during that sexual activity to avoid his sexual partner's resulting pregnancy. Accordingly, he cannot state a claim for a violation of his substantive due process rights under the Fourteenth Amendment by the application of the laws of Kentucky for establishing paternity and imposing and enforcing child support obligations.

Next, the Court must admit that is is absolutely flabbergasted by the suggestion that Plaintiff should be able

to force his child's step-father to adopt Plaintiff's son. Again, it is well accepted that the "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 u.S. 745 (1982); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977). As the decision to adopt or not to adopt a child is no doubt an extremely personal decision, the Court doubts the wisdom of any sort of legal system purporting to foist the adoption of someone else's child upon an individual. Of course, that is not the matter before the Court today, and the Court can safely confine its opinion to the fact that Plaintiff clearly does not have a constitutionally protected right to force someone else to adopt his child. In any event, whether or not Commonwealth law provides him that option, it would not touch on his decision to become or not to become a father in the first place. Accordingly, he can state no claim on these grounds.

3. EQUAL PROTECTION

The Equal Protection Clause of the 14th Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike.

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439 (1995) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Unless a suspect class (classification by race, alienage, or national origin), quasi-suspect classification (gender or legitimacy), or a fundamental right is at stake, equal protection claims are analyzed using a deferential rational basis test.[7] *Heller v. Doe*, 509 U.S. 312, 320 (1993). Generally, legislation is presumed to be valid and sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440. Thus, it is taught that:

> [w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

Id. at 440.

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[7] Where suspect classification occurs:

> ...such discrimination is unlikely to be soon rectified by legislative means, [and] these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution.

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (internal citations omitted). As quasi-suspect classifications, those based on gender or legitimacy fail unless they are substantially related to a sufficiently important governmental interest. *Id.* at 441.

Defendants argue that Plaintiff's equal protection claims are subject only to an analysis under the rational basis test.[8] The Court agrees as it is hard-pressed to determine to which class Plaintiff purports to belong and certainly cannot identify a suspect class, quasi-suspect classification,

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[8] Plaintiff has responded only that such an attack on the merits is untimely since he argues that the legislation of which he complains is unconstitutional "as applied" to specific factual situations (including motivations of the parties, actions of the parties in manipulating state court procedures, circumstances surrounding the conception and pregnancy of the child, and whether best interests of children living in specific types of family environments are sacrificed by constitutionally-deficient adoption statutes)" and will require "extensive discovery" to establish the factual situations for purposes of summary judgment. [Response at 27.]

On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), this Court must accept all factual allegations in Plaintiffs' amended complaint as true, which is to say that further discovery is simply not necessary. As noted above, it is clear from the complaint that Plaintiff alleges no state actions which have impacted the fundamental rights he alleges to have been violated in this matter. Further, some of the rights that he alleges to have been impacted by the state action simply do not have the constitutional import he assigns to them nor has he identified the type of irrational relationship between the interests served by the challenged legislation and the legislation or unequal application of those laws that would otherwise permit this matter to survive a motion to dismiss. Finally, insofar as he wishes to take discovery in order to demonstrate "manipulations of state court proceedings," he has not pled any procedural inconsistencies of this nature in his complaint, even denying that he would or could state a procedural due process claim in his response. Accordingly, his motion shall be denied.

or, as stated earlier in this opinion, a fundamental right that is at stake. Assuming that Plaintiff purports to be a member of a class of "individuals obligated to pay child support," "men who have fathered children out of wedlock," "men who do not wish to be fathers but who have, nonetheless, fathered children," or "men who have fathered children now living with their mothers in a home with a step-father that has not adopted them," the Court is still unclear on what, if any, unequal treatment at the hands of the law is alleged. In any event, there is no doubt for this Court that the statutes of which Plaintiff complains are rationally related to a legitimate state interest, providing for the material needs of children.[9] Beyond recognizing this rational relationship, the Court cannot and will not second guess the wisdom of the Commonwealth's legislature's decision to enact statutes requiring individuals taking part in sexual activity that results in the birth of a child to shoulder the responsibility of providing for the needs of that child in order to satisfy this state interest. His claim for violation of his right to equal protection of the laws under the Fourteenth Amendment shall be dismissed.

IV. CONCLUSION

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[9] Further, Plaintiff's assertion that Defendants' ability to engage in a rational basis analysis of his equal protection claim proves that he has state a claim upon which relief may be granted is ridiculous. Rather than identify which class he purports to be a member of, Plaintiff has ignored Defendant's invitation to explore his claim in even the most esoteric terms.

For all of the reasons stated above, it is clear to this Court that Plaintiff's claims cannot survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), and Defendant's motions to dismiss shall be granted. Further, for the reasons stated in this opinion, it is clear that Plaintiff's pending motions as discussed above should be denied.

Accordingly, **IT IS ORDERED**:

(1) that Plaintiff's motion for leave to file a surreply [Record no. 35] be, and the same hereby is **DENIED**;

(2) that Plaintiff's motion to reopen discovery and for an indefinite extension of time in which to respond to Defendants' motions for summary judgment [Record No. 27] be, and the same hereby is, **DENIED**;

(3) that Plaintiff's motion for leave to amend his complaint and to join an additional defendant, the Kentucky Cabinet for Families and Children [Record no. 23], be, and the same hereby is, **DENIED**;

(4) that Defendant's motions to dismiss or for summary judgment [Record Nos. 7 & 12] be, and the same hereby are, **GRANTED IN PART** and **DENIED AS MOOT IN PART**;

(5) that all Plaintiff's claims be, and the same hereby are, **DISMISSED WITH PREJUDICE**.

This the 5th Day of December, 2003.

Signed by: ***Joseph M. Hood, United States District Judge***

TEXT OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

199.480 Parties defendant in an adoption proceeding – Process – Guardian ad litem.

(1) The following persons shall be made parties defendant in an action for leave to adopt a child:

(a) The child to be adopted;

(b) The biological living parents of a child under eighteen (18), if the child is born in lawful wedlock. If the child is born out of wedlock, its mother; and its father, if one (1) of the following requirements is met:

1. He is known and voluntarily identified by the mother by affidavit;

2. Prior to the entry of a final order in a termination proceeding, he has acknowledged the child as his own by affirmatively asserting paternity in the action or to the custodial agency or the party bringing the action within sixty (60) days after the birth of the child;

3. He has caused his name to be affixed to the birth certificate of the child;

4. He has commenced a judicial proceeding claiming parental right;

5. He has contributed financially to the support of the child, either by paying the medical or hospital bills associated with the birth of the child or financially contributed to the child's support; or

6. He has married the mother of the child or has lived openly or is living openly with the child or the person designated on the birth certificate as the biological mother of the child.

A putative father shall not be made a party defendant if none of the requirements set forth above have been met, and a biological parent shall not be made a party defendant if the parental rights of that parent have been terminated under KRS Chapter 625, or under a comparable statute of another jurisdiction;

(c) The child's guardian, if it has one.

(d) If the care, custody, and control of the child has been transferred to the cabinet, or any other individual or individuals, institution, or agency, then the cabinet, the other individual or individuals, institution, or agency shall be named a party defendant, unless the individual or individuals, or the institution or agency is also the petitioner.

(2) Each party defendant shall be brought before the court in the same manner as provided in other civil cases except that if the child to be adopted is under fourteen (14) years of age and the cabinet, individual, institution, or agency has custody of the child, the service of process upon the child shall be had by serving a copy of the summons in the action upon the cabinet, individual, institution or agency, any provision of CR 4.04(3) to the contrary notwithstanding.

(3) If the child's biological living parents, if the child is born in lawful wedlock, or if the child is born out of wedlock, its mother, and if paternity is established in legal action or if an affidavit is filed stating that the affiant is

father of the child, its father, are parties defendant, no guardian ad litem need be appointed to represent the child to be adopted.

405.020 Custody, nurture, and education of minor child -- Physically and mentally disabled children -- De facto custodian.

(1) The father and mother shall have the joint custody, nurture, and education of their children who are under the age of eighteen (18). If either of the parents dies, the survivor, if suited to the trust, shall have the custody, nurture, and education of the children who are under the age of eighteen (18). The father shall be primarily liable for the nurture and education of his children who are under the age of eighteen (18) and for any unmarried child over the age of eighteen (18) when the child is a fulltime high school student, but not beyond completion of the school year during which the child reaches the age of nineteen (19) years.

(2) The father and mother shall have the joint custody, care, and support of their children who have reached the age of eighteen (18) and who are wholly dependent because of permanent physical or mental disability. If either of the parents dies, the survivor, if suited to the trust, shall have the custody, care, and support of such children.

(3) Notwithstanding the provisions of subsections (1) and (2) of this section, a person claiming to be a de facto custodian, as defined in KRS 403.270, may petition a court for legal custody of a child. The court shall grant legal custody to the person if the court determines that the person

meets the definition of de facto custodian and that the best interests of the child will be served by awarding custody to the de facto custodian.

(4) Notwithstanding the provisions of subsections (1) and (2) of this section, if either parent dies and at the time of death a child is in the custody of a de facto custodian, as defined in KRS 403.270, the court shall award custody to the de facto custodian if the court determines that the best interests of the child will be served by that award of custody.

405.430 Genetic testing to establish paternity -- Cabinet may determine child support or child care obligation -- Adjustment of child support or child support obligation -- Order requiring parent to work or continue educational or training activities -- Disclosure of financial records -- Voluntary acknowledgment of paternity as basis -- Administrative subpoenas to enforce child support obligation -- Prohibition -- Employment assistance.

(1) When a parent presents himself to the cabinet for the voluntary establishment of paternity and clear evidence of parentage is not present, the cabinet shall pay when administratively ordered the cost of genetic testing to establish paternity, subject to recoupment from the alleged father when paternity is established.

(2) The cabinet shall obtain additional testing in any case if an original test is contested, upon request and advance payment by the contestant.

(3) In a contested paternity case, the child, the mother, and the putative father shall submit to genetic testing upon a request of any of the parties, unless the person or guardian of the person who is requested to submit to genetic testing shows good cause, taking into account the best interests of the child, why the genetic tests cannot be performed. The request shall be supported by a sworn statement of the party, requesting that the test be performed, which shall

include the information required by 42 U.S.C. sec. 666(a)(5)(B)(i) or (ii).

(4) When a parent who fails to support a child is not obligated to provide child support by court order, the cabinet may administratively establish a child support obligation based upon a voluntary acknowledgment of paternity as set forth in KRS Chapter 406, the parent's minimum monthly child support obligation and proportionate share of child care costs incurred due to employment or job search of either parent, or incurred while receiving elementary or secondary education, or higher education or vocational training which will lead to employment. The monthly child support obligation shall be determined pursuant to the Kentucky child support guidelines set forth in KRS 403.212. The actual cost of child care shall be reasonable and shall be allocated between the parents in the same proportion as each parent's gross income, as determined under the guidelines, bears to the total family gross income.

(5) The cabinet shall recognize a voluntary acknowledgment of paternity as a basis for seeking a support order, irrespective of the alleged father's willingness to consent to a support order.

(6) When in the best interest of the child, the cabinet may review and adjust a parent's child support obligation or child care obligation as established by the cabinet, upon a

request of the cabinet when an assignment has been made, or upon either parent's petition if the amount of the child support awarded under the order differs from the amount that would be awarded in accordance with KRS 403.212. The cabinet shall notify parents at least once every three (3) years of the right to a review.

(7) In establishing or modifying a parent's monthly child support obligation, the cabinet may use automated methods to identify orders eligible for review, conduct the review, identify orders eligible for adjustment, and apply the adjustment to eligible orders in accordance with KRS 403.212. The cabinet shall utilize information, including financial records, about the parent and child which it has good reason to believe is reliable and may require the parents to provide income verification.

(8) In cases in which past-due support is owed for a child receiving public assistance under Title IV-A of the Federal Social Security Act, the cabinet shall issue an administrative order, or seek a judicial order, requiring the obligated parent to participate in work activities, or educational or vocational training activities for at least twenty (20) hours per week, unless the parent is incapacitated as defined by 42 U.S.C. sec. 607.

(9) The cabinet may disclose financial records only for the purpose of establishing, modifying, or enforcing a child support obligation of an individual. A financial institution

shall not be liable to any individual for disclosing any financial record of the individual to the cabinet attempting to establish, modify, or enforce a child support obligation.

(10) The cabinet may issue both intrastate and interstate administrative subpoenas to any individual or entity for financial or other information or documents which are needed to establish, modify, or enforce a child support obligation pursuant to Title IV-D of the Social Security Act, 42 U.S.C. secs. 651 et seq. An administrative subpoena lawfully issued in another state to an individual or entity residing in this state shall be honored and enforced in the Circuit Court of the county in which the individual or entity resides.

(11) In any case where a person or entity fails to respond to a subpoena within the specified time frame, the cabinet shall impose a penalty.

(12) No person shall knowingly make, present, or cause to be made or presented to an employee or officer of the cabinet any false, fictitious, or fraudulent statement, representation, or entry in any application, report, document, or financial record used in determining child support or child care obligations.

(13) If a person knowingly or by reason of negligence discloses a financial record of an individual, that individual may pursue civil action for damages in a federal District

Court or appropriate state court. No liability shall arise with respect to any disclosure which results from a good faith, but erroneous, interpretation. In any civil action brought for reason of negligence of disclosure of financial records, upon finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to:

(a) The sum of the greater of one thousand dollars ($1,000) for each act of unauthorized disclosure of financial records; or

(b) The sum of the actual damages sustained by the plaintiff resulting from the unauthorized disclosure; plus

(c) If willful disclosure or disclosure was a result of gross negligence, punitive damages, plus the costs, including attorney fees, of the action.

(14) The cabinet shall issue an administrative order or seek a judicial order requiring a parent with a delinquent child support obligation, as defined by administrative regulation promulgated under KRS 15.055, to participate in the program described in KRS 205.732 to help low-income, noncustodial parents find and keep employment unless the parent is incapacitated as defined by 42 U.S.C. sec. 607.